Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1102

JOHN D. ASHCROFT, Attorney General of the State of Missouri,

and

GEORGE A. PEACH, Circuit Attorney of the City of St. Louis, Missouri,

Appellants,

vs.

MICHAEL FREIMAN, M.D.,

and

ALLEN S. PALMER, D.O.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

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JOHN D. ASHCROFT, Attorney General of the State of Missouri,

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Appellants,

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MICHAEL FREIMAN, M.D.,

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ALLEN S. PALMER, D.O.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

The Attorney General for the State of Missouri and the Circuit Attorney for the City of St. Louis, the appellants, appeal from that portion of the final judgment of the United States Court of Appeals for the Eighth Circuit, dated September 13, 1978, holding that §188.045, RSMo Supp. 1975, is an unconstitutional violation of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. Although the name of J. Brendan Ryan appeared during the

course of these proceedings before the lower courts, because Mr. Ashcroft and Mr. Ryan were sued in their official capacities only, the name of Mr. George A. Peach has been substituted as the present Circuit Attorney for the City of St. Louis, Missouri.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which appears in the appendix hereto, p. 1-A, *infra*, is reported at 584 F.2d 247 (8th Cir. 1978).

Doctors Freiman and Palmer, appellees in this Court, appealed to the Eighth Circuit from two separate orders, both supported by memoranda, of the United States District Court for the Eastern District of Missouri. The memorandum of the United States District Court for the Eastern District of Missouri denying the motion for summary judgment of appellees Freiman and Palmer, which appears in the appendix hereto, p. 11-A, *infra*, is reported at 440 F.Supp. 1193 (E.D.Mo. 1977). The memorandum of the United States District Court for the Eastern District of Missouri granting the motion for summary judgment of appellant Ashcroft, which appears in the appendix hereto, p. 18-A, *infra*, is reported at 443 F.Supp. 1390 (E.D.Mo. 1978).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit, holding, in part, that a Missouri state statute, specifically §188.045, RSMo Supp. 1975, is unconstitutional, was filed on September 13, 1978. See p. 1-A, *infra*. A motion for rehearing, filed by Doctors Freiman and Palmer, was entertained by the Eighth Circuit and the order respecting the motion for rehearing was filed on October 10, 1978. See p. 20-A, *infra*.

A notice of appeal to this Court was duly filed in the United States Court of Appeals for the Eighth Circuit on December 14, 1978. See p. 22-A, *infra*.

This appeal is being docketed in this Court within 90 days from the date of the order respecting the motion for rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

QUESTION PRESENTED

Whether §188.045, RSMo Supp. 1975 is violative of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States as representing an impermissible state requirement that physicians inform their patients of the provisions of §188.040, RSMo Supp. 1975, to the effect that one consequence of the decision to abort, should a live birth result, could be the termination of parental rights, there being a legitimate state interest in protecting prospective mothers by requiring an informed consent to the abortion decision?

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Fourteenth Amendment, Section 1, United States Constitution:

> "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 188.045, RSMo Supp. 1975, found unconstitutional by the United States Court of Appeals for the Eighth Circuit:

> "Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 by the attending physician and the woman shall certify in writing that she has been so informed."

Section 188.040, RSMo Supp. 1975, referred to in §188.045 and which all lower courts agree cannot be made the subject of constitutional attack by these appellees because of their lack of standing:

> "In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411 [sic], RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant."[1]

STATEMENT OF THE CASE

The General Assembly of the State of Missouri enacted into law Chapter 188, RSMo Supp. 1975, entitled Regulation of Abortions, effective June 14, 1974. Included in the statutory enactment were §§188.040 and 188.045.

1. All lower courts and the parties herein are in agreement that the statutory reference to §211.411 should read as §211.441.

Dr. Michael Freiman, one appellee in the present case, together with Planned Parenthood of Central Missouri and one other physician, initiated a constitutional challenge before a three-judge panel of the United States District Court for the Eastern District of Missouri asking injunctive relief against enforcement of most of the legislation enacted to regulate abortions. As in the present case, the Attorney General of the State of Missouri and the Circuit Attorney for the City of St. Louis, were the named defendants in that lawsuit. Specifically attacked in that lawsuit was what is now §188.040. That statutory section applies "where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother." In such case, the child is to be considered "an abandoned ward of the state" and the mother and consenting father lose their "parental rights and obligations" relating to such infant as provided for in a specific section of the Missouri Juvenile Code. That litigation initiated by Dr. Freiman and others culminated in the opinion by this Court in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). This Court held that the physicians in *Planned Parenthood* lacked standing to challenge the termination of parental rights provisions of §188.040.

> "The physician-appellants do not contend that this section of the Act imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is 'sufficiently concrete' to satisfy the 'case or controversy' requirement of a federal court's Art III jurisdiction. Singleton v. Wulff, post, at 112, 49 L Ed 2d 826, 96 S Ct 2868. Accordingly, the physician-appellants do not have standing to challenge § 7 [188.040] of the Act."[2]

2. 428 U.S. 52, 63 n.2, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

On July 8, 1976, the appellees filed this lawsuit seeking a declaratory judgment that §§188.040 and 188.045, RSMo Supp. 1975, were unconstitutional and asking injunctive relief against their enforcement. The Attorney General for the State of Missouri, as a named defendant, filed his answer on July 29, 1976.

The answer filed by the appellant Attorney General affirmatively contended that the appellee-physicians were barred from challenging the constitutionality of §188.040 because their contentions had already been decided in an adverse manner by the Supreme Court in the *Planned Parenthood* case, and asked the District Court to dismiss the challenge to §188.040 because the physicians bringing suit did not have the requisite standing to challenge the provisions of that statute.

On July 6, 1976, the Attorney General filed separate sets of interrogatories directed toward each of the two physicians who had filed the lawsuit. Joint answers to the separate sets of interrogatories were filed on October 13, 1976. The answer to one of the interrogatories indicated that the appellees had jointly advised some 40 to 60 patients of the provisions of §188.040 by reading that section verbatim to them, but that none of the patients so informed had changed their minds and decided not to obtain abortions.

The appellees filed their motion for summary judgment, in the District Court, attaching affidavits, on October 27, 1976. A memorandum in support of that motion was filed on November 12, 1976. The appellant Attorney General filed suggestions in opposition to the motion for summary judgment, together with the supporting affidavit of Dr. Thomas H. Hilgers, on or about February 19, 1977.

In their affidavits filed in support of their motion for summary judgment below, each physician-appellee stated

that he was actively engaged in the medical practice of obstetrics and gynecology offering and providing pregnancy termination procedures within the first twelve weeks of gestation. Each physician alleged that the possibility of a live birth resulting from an abortion performed within their medical practice was totally nonexistent and that the duty imposed by the challenged legislation was highly adverse to the best health interests of his patients. Each attested that the challenged statutory sections increased the anxiety of their patients during abortion procedures thereby raising the risks of mortality and morbidity. Each further attested that the encumbrance represented by the challenged statutory sections might result in the making of incorrect decisions by persons considering abortions. The physicians separately stated their beliefs that the requirement of §188.045 caused them to provide information to their patients which was adverse to the customary practices of medicine and not in the best interests of their patients.

In the affidavits submitted in support of the suggestions opposing the grant of summary judgment to the appellees, Dr. Hilgers attested that he was an Assistant Professor in the Department of Gynecology and Obstetrics of the St. Louis University School of Medicine. Dr. Hilgers stated that he had treated or counseled patients, during his medical practice, prior to or following abortions. He stated that the patients whom he counseled expressed interest and concern primarily in the complications which might result from an abortion. Dr. Hilgers attested to his belief that all patients should be advised in advance of potential complications arising from any medical procedure and that all patients should give an informed consent before undergoing a surgical procedure. The doctor stated his opinion that a patient's consent to an abortion cannot be informed unless the patient is fully advised of all possible ramifications. Dr. Hilgers attested that it was in the best interests

of the patient, and consistent with the highest standards of medical practice, to provide sufficient information on which the relative benefits and risks of any medical procedure could be weighed. Dr. Hilgers stated his belief that it would not be possible to generalize how patients would react when informed by physicians as required by §188.045. Dr. Hilgers concluded his affidavit by attesting that infants can and have been born alive after an attempted abortion and that, although not likely in the present state of medical technology, advances in medical technology may be developed which would enable fetuses to survive abortions attempted in the first twelve weeks of gestation.

The three-judge District Court composed of the Honorable William H. Webster, United States Circuit Judge, the Honorable H. Kenneth Wangelin, United States District Judge and the Honorable John F. Nangle, United States District Judge, entered its order, on November 28, 1977, holding that the physician-appellees lacked standing to challenge §188.040 and denying the motion for summary judgment. The order was supported by the memorandum of Judges Wangelin and Nangle and the concurring memorandum of Judge Webster. The order and memoranda are included herein at pages 10-A and 11-A, *infra*. The three-judge District Court disposed of the appellees' motion for summary judgment as follows:

> "Before the Court determines whether a plaintiff may assert the rights of third parties, the plaintiff's standing to challenge the legislation must be established. Plaintiffs have not established their standing to challenge § 188.040. *Planned Parenthood, supra.*
>
> With only § 188.045 remaining, it is clear that plaintiff's motion for summary judgment must be denied. In *Planned Parenthood, supra,* the Court held that a state may permissibly require a woman's prior written consent, noting that 'it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences.' *Id.* at 67, 96 S.Ct. at 2840. . . ." *Frieman* v. *Ashcroft,* 440 F.Supp. 1193 at 1195 (E.D.Mo. 1977).

Although Judge Webster, in his concurring opinion, clearly indicated his belief that §188.040 was unconstitutional, he agreed that the question of standing was an "insurmountable" obstacle to the appellees' attack on the parental rights termination provision of the Missouri law.

By memorandum dated November 29, 1977, the appellees amended their complaint in the District Court by striking all reference to injunctive relief. There no longer being a prayer for injunctive relief against the enforcement of the challenged state statutes, this matter then proceeded before a single judge in the District Court. The defendant Attorney General filed his motion for summary judgment on February 13, 1978. On February 17, 1978, the Honorable John F. Nangle of the United States District Court for the Eastern District of Missouri entered his order, supported by memorandum, granting defendants' motion for summary judgment. The order and memorandum appears in the appendix hereto at pages 17-A and 18-A, *infra*. The reasoning of Judge Nangle was that:

> "In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Court held that a state may permissibly require written consent, as 'it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences.' *Id.* at 67, 96 S.Ct. at 2840. Certainly, the termination of parental rights, should a live birth result, is a consequence of the decision to abort. Absent a party with standing to challenge § 188.040, termination of parental rights

> does remain a consequence of the decision to abort and the state may permissibly require a physician to so inform the patient. When viewed in this context the statute is clearly permissible. *Cf. Whalen* v. *Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). . . ." *Frieman* v. *Ashcroft*, 443 F.Supp. 1390, 1391 (E.D.Mo. 1978).

In due time, the physician-appellees filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit from both orders of the District Court disposing of the parties' respective motions for summary judgment. The appeal was perfected, orally argued, and decision was rendered thereon by the Eighth Circuit on September 13, 1978.

Circuit Judges Stephenson and Henley and Senior Circuit Judge Ingraham affirmed that portion of the District Court's orders finding that physicians are without standing to challenge the constitutionality of §188.040, but reversed the District Court with respect to the constitutionality of §188.045.

In affirming the District Court on the matter of standing, the Eighth Circuit relied upon the language of *Planned Parenthood of Central Missouri* v. *Danforth*, previously quoted, and upon the language in one of that Court's opinions in a similar case. *Hodgson* v. *Lawson*, 542 F.2d 1350, 1355 n.2 (8th Cir. 1976). Although unable to reach the merits of §188.040 because these appellees lack standing to have challenged that statute, the Eighth Circuit made it clear, in dicta, that they believed the termination of parental rights provision of §188.040 to be unconstitutional. In striking down §188.045, the Court of Appeals held that the legitimate state interest of protecting mothers by requiring informed consents to abortion decisions was not reasonably related to the requirement that a physician tell

his patients of the parental rights provision of §188.040 and that the statute was, therefore, a violation of the equal protection and due process clauses of the Fourteenth Amendment.

On or about September 15, 1978, Doctors Freiman and Palmer petitioned the Court of Appeals for a rehearing asking that Court to consider an award of reasonable attorneys' fees. In an order filed on October 10, 1978, the court below disposed of the petition for rehearing by awarding a sum in attorneys' fees incurred during the appeal.

The appellant filed his notice of appeal to the United States Supreme Court, with the Clerk of the United States Court of Appeals for the Eighth Circuit, on December 14, 1978.

THE QUESTION IS SUBSTANTIAL

The question as to whether the Fourteenth Amendment prohibits a state from requiring physicians to inform their abortion-seeking patients of the existence of a state statute which would terminate their parental rights should a live birth occur is a novel and substantial one. The question has never before been addressed by this Court. That the question is difficult to resolve is made clear by the fact that of the six federal judges having dealt with this case in the courts below, three have upheld the validity of §188.045, RSMo Supp. 1975 and three have invalidated that statute.

The United States District Court for the Eastern District of Missouri, first acting as a panel of three judges, and again acting as a single judge, held that since Missouri is constitutionally entitled to the written informed consents

of patients seeking abortion services,[3] and because termination of parental rights is a possible consequence of the decision to abort, absent a party with standing to challenge §188.040, Missouri may permissibly require physicians to perform the function demanded of them by §188.045. 443 F.Supp. 1390, 1391 (E.D.Mo. 1978); pp. 18-A-19-A, *infra*.

Both lower courts have agreed that the appellees are without standing to challenge the parental rights termination provisions of §188.040, RSMo Supp. 1975. Therefore, in Missouri, the birth of a live child following an abortion attempt has, as one of its natural consequences, the effect on parental rights provided for by §188.040. The District Court correctly held that the *Planned Parenthood* case effectively disposes of the appellees' challenge against the constitutionality of §188.045.

Section 188.045 requires only that a physician advise his patient before an abortion of the terms of §188.040. So advising a patient should be an important aspect of obtaining a woman's informed consent. Not to do so would deprive her of the opportunity to make her decision in light of all significant and relevant factors.

The Eighth Circuit invalidated §188.045 because of that court's concern that the section would put physicians in a straitjacket by first requiring "the physician to warn his patient of consequences that *should not* occur" (emphasis added), and, secondly, because the requirement that the physician tell his patient of §188.040 is not reasonably

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3. *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 67, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).

> "The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent."

related to the purpose of informed consent. *Freiman* v. *Ashcroft*, 584 F.2d 247, 251 (8th Cir. 1978); included in the appendix herein at p. A-1, *infra*. Although it is true that the Missouri statutes do not sanction, generally, the abortion of post-viable infants, that does not necessarily mean that the live births of infants out of attempted abortion procedures is impossible. In determining the period of gestation, the appellees, and other physicians, must rely on information supplied to them by their patients with respect to the date of conception. Because a doctor believes he is performing an abortion during the first twelve weeks of gestation does not guarantee that that is the case. Furthermore, technological advances will increase the ability of the medical profession to preserve the lives of fetuses born during the earlier stages of pregnancy. Certainly, there is nothing in §188.045 which would prohibit the appellees or other physicians from informing their patients that no abortion attempted during the first twelve weeks of gestation, to date, has resulted in a live-born child. Section 188.040 comes into effect only if an abortion is attempted on a viable fetus. Section 188.045 leaves the appellees free to advise their patients of the likelihood of the fetuses they carry being viable. Because a live birth should not occur in the abortion-related medical practice of appellees or under the Missouri statutes, does not mean that it *could not* happen nor that informing patients of the provisions of §188.040 is necessarily meaningless.

Likewise, §188.045 is not automatically unconstitutional for failure to distinguish on the basis of trimesters. See *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), in which this Court upheld a patient consent requirement and a record-keeping requirement, neither of which distinguished on the basis of trimesters, and *Bellotti* v. *Baird*, 428 U.S. 132, 149-150, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976).

Although the lower court was without jurisdiction to so decide, because these appellees lack standing to challenge the constitutionality of §188.040, it is clear on the face of the opinion below that the real justification for invalidating §188.045 was the belief of the Eighth Circuit that §188.040 is patently unconstitutional. The lower court cited *Wynn* v. *Scott*, 449 F.Supp. 1302, 1322-1324 (N.D.Ill. 1978) to support that conclusion. The court in *Doe* v. *Rampton*, 366 F.Supp. 189, 193 (D.Utah 1973), also voided a termination of parental rights provision of a state law. However, this Court, and the federal courts of appeal, have never conclusively determined that a statutory provision like §188.040 is unconstitutional. Because these appellees were inappropriate plaintiffs, the Eighth Circuit also was not able to do so. In effect, the Eighth Circuit found §188.045 to be unconstitutional because it did not like the provisions of §188.040, which provisions were not properly before it.

Standing alone, as it must for the present inquiry, §188.045 permissibly requires a physician, in order to obtain an informed consent to an abortion procedure, to advise his patient that parental rights over a live-born infant could be terminated.

The appellant Attorney General submits that §188.040 is not patently violative of the due process clause. At the very least, the Court of Appeals should have afforded the state the opportunity, before invalidating §188.045 upon the basis that §188.040 was unconstitutional, to show to the District Court that the termination of parental rights provisions of the Missouri law gives ample due process safeguards to the consenting parents of children born live out of attempted abortions. Because the appellees' challenge against §188.040 was dismissed because they lacked standing, the state was never required to support the merits of §188.040 by evidence or legal argument in the District Court.

In *Roe* v. *Wade*, 410 U.S. 113, 163-164, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), this Court stated:

> "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion . . ."

Certainly, if Missouri can constitutionally prohibit abortion after viability in the interest of protecting *potential* human life, then *after a* woman has had her pregnancy terminated, Missouri can protect the *actual* life of a fetus who survives the procedure thereby conclusively proving that he or she was viable at the time the abortion was performed.

In Missouri "viability" is defined as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Section 188.015, RSMo Supp. 1975. That definition was approved by the United States Supreme Court in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 63-65, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). By definition, §188.040 can become effective only with respect to post-viable human beings. If the state can proscribe abortion altogether after viability, as the Supreme Court said it could in *Roe* v. *Wade*, then it must have authority to enact provisions effecting the care and custody of children resulting from post-viable abortion attempts. The appellants submit that §188.040 is not patently unconstitutional. Had the appellees had the requisite standing, the state could have

shown that §188.040 included sufficient due process safeguards to satisfy the Fourteenth Amendment. Section 188.045 requires only that physicians inform their patients of another statute which the state has enacted effecting the care and custody of children resulting from post-viable abortion attempts.

Implicit in the position taken by the appellees before the lower courts, and in the position enunciated by the Court of Appeals, is the proposition that informing female patients of the parental rights statute may adversely influence individual decisions whether to abort. However, in answer to the interrogatories before the District Court, these appellees indicated that this had never occurred in their medical practice. If a woman were to change her mind solely as a result of being informed of the parental rights provision, then arguably her initial decision to terminate her pregnancy was extremely tenuous. For that patient, not obtaining abortion may have been best. Irregardless, physicians are not placed in a straitjacket because they can inform their patients that a live birth has never resulted during the first twelve weeks of gestation. These appellees claim never to perform abortions except during the first twelve weeks of pregnancy, if in fact the information they have been given by their patients with respect to the period of gestation is accurate. The compliance by the appellees with §188.045 should assist them in insuring that their patients give accurate information with respect to the length of pregnancy so as to assist them in determining whether the abortion sought by the patient is a legal one.

Section 188.040, at present, is a valid and effective portion of the statutory law of the State of Missouri. That statute represents a potential impact on every abortion procedure performed. Section 188.045 permissibly protects the state interest, found to exist by the Court of Appeals, in protecting mothers by requiring informed consents to abortion decisions. In Missouri, that consent cannot truly be informed and enlightened absent the knowledge, of the patient, that the parental rights statute exists.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January, 1979

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1144

Michael Freiman, M.D., and Allen S. Palmer, D.O.,
Appellants,

v.

John D. Ashcroft, Attorney General of the State of Missouri and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 14, 1978
Filed: September 13, 1978

Before STEPHENSON, Circuit Judge, INGRAHAM,* Senior Circuit Judge, and HENLEY, Circuit Judge.

STEPHENSON, Circuit Judge.

The issues before this court are: (1) does appellant-physician Michael Freiman have standing to challenge Mo. Ann. Stat. § 188.040 (Vernon 1978), and, if so, is section 188.040 constitutional; and (2) is Mo. Ann. Stat. § 188.045 (Vernon 1978) constitutional.

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*The Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Freiman orginally filed suit seeking declaratory and injunctive relief, and moved for summary judgment. The three-judge district court[1] held that Freiman did not have standing to challenge section 188.040. Section 188.040 provides:

> In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant. [Section 211.411 probably should read 211.441.]

The court held that Freiman did have standing to challenge section 188.045. Section 188.045 provides:

> Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 by the attending physician and the woman shall certify in writing that she has been so informed.

The court, however, did not find section 188.045 to be unconstitutional. Thus Freiman's motion for summary judgment was denied. Appellee John D. Ashcroft, Attorney General of Missouri, then moved for summary judgment

1. The Honorable William H. Webster, former United States Circuit Judge for the Eighth Circuit, The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri, and The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

dismissing this cause, which was granted by the district court.[2]

Because section 188.045 is a violation of the due process and equal protection clauses of the Fourteenth Amendment, we reverse in part.

The standing of physicians to challenge section 188.040 of the Missouri statutes was previously litigated in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1975). In *Danforth*, the Supreme Court denied standing, stating:

> The physician-appellants do not contend that this section of the Act [Mo. Rev. Stat. § 188.040 (Vernon 1978)] imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is "sufficiently concrete" to satisfy the "case or controversy" requirement of a federal court's Art. III jurisdiction. *Singleton* v. *Wulff*, [428 U.S. 106, 112 (1975)]. Accordingly, the physician-appellants do not have standing to challenge §7 of the Act [Mo. Rev. Stat. § 188.040 (Vernon 1978)].

Id. at 62 n.2.

On the basis of the Supreme Court's holding, the three-judge district court in this case held that the *Singleton* requirement of injury in fact was not satisfied sufficiently to establish Freiman's standing to challenge section 188.040. *Freiman* v. *Ashcroft*, 440 F. Supp. 1193 (E.D. Mo. 1977).

This court has also once before commented upon standing of physicians to challenge a very similar statute. In *Hodgson* v. *Lawson*, 542 F.2d 1350 (8th Cir. 1976), this court considered the constitutionality of Minn. Stat. Ann.

2. The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri.

§ 145.415(3) (Supp. 1978), which reads in part: "[W]henever an abortion of a potentially viable fetus results in a live birth, the child shall be an abandoned ward of the state and the parents shall have no parental rights or obligations * * *." *Id.* In *Hodgson*, this court found the statute to be unconstitutional because of its use of the phrase "potentially viable," but we additionally noted:

> The constitutionality of Minn.Stat. § 145.415, subd. 3 * * * is also highly questionable for reasons not advanced by the appellees here. *See Doe* v. *Rampton*, 366 F.Supp. 189, 193 (C.D. Utah 1973), where a similar statutory provision was struck down because it provided for termination of parental rights without due process of law. *The physician-appellees here, as in Planned Parenthood of Central Missouri* v. *Danforth*, [428 U.S. 52, 62 n.2 (1975)], *would not have standing to challenge subd. 3 because they cannot claim any injury in fact.*

Hodgson v. *Lawson, supra*, 542 F.2d at 1355 n.2 (emphasis added).

The recognition that Freiman has standing to challenge section 188.045 does not alter his lack of standing to challenge section 188.040. Section 188.045 places a duty upon Freiman, and related statutes subject him to sanctions, including criminal penalties, for failure to perform that duty. *See* Mo. Stat. Ann. §§ 188.065 & .075 (Vernon 1978). His allegations that concern direct injury to him,[3] via the

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3. In particular, plaintiff alleges in his affidavit:

> 4. The possibility of a live birth resulting from an abortion performed within the present medical practice of plaintiff is totally non-existent [within first trimester] and has never occurred in recorded medical history; and yet, the duty imposed by the legislation herein challenged is

(*Continued on following page*)

doctor-patient relationship, are all tied to section 188.045; however, the allegations fail to provide a basis for standing to challenge section 188.040. Because Freiman must establish his own standing as a prerequisite to asserting the rights of his patients, *see Singleton* v. *Wulff*, 428 U.S. 106, 112 (1975), the constitutionality of the statute which provides for termination of parental rights cannot be dealt with here. This disposal is not without difficulty, for as Judge Webster, in his concurrence in the lower court opinion points out, "[Section 188.040] is perhaps the most offensive of the *in terrorem* clauses that were enacted by the Missouri legislature in 1974 * * *. This patently unconstitutional appendage totally lacking in due process, survives like the last leaf in winter after *Planned Parenthood of Central Missouri* v. *Danforth* [*supra*] * * *. It is regrettable that a Jane Doe does not come forward so that this question may be squarely addressed." *Freiman* v. *Ashcroft, supra*, 440 F. Supp. at 1195 (Webster, J., concurring).

Freiman, as the three-judge district court recognized, does have standing to challenge section 188.045. *Id.* The district court erred, however, when it held section 188.045 constitutional on the basis of *Danforth's* provision that a state may permissibly require a woman's prior informed

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Footnote continued—

> highly adverse to the best health interests of his patients and has the reasonable possibility of having catastrophic effects upon some patients.
>
> 5. * * * The provisions as to the termination of parental rights is highly disturbing to the patient and increases her anxiety during the medical procedure, thereby raising the risks of mortality and morbidity to her.
>
> 6. * * * requires the physician by law to provide information to the patient which is adverse to the customary practice of medicine, which he does not believe to be in her best interests, and which requires the physician to jeopardize the health, interests and safety of his patient.

consent for an abortion.[4] *Freiman* v. *Ashcroft*, No. 76-616C(3) (E.D. Mo. filed Feb. 17, 1978).

The Supreme Court in *Roe* v. *Wade*, 410 U.S. 113 (1973), recognized that a fundamental constitutional right of personal privacy exists.

> This right of privacy * * * is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physicial health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153. Although the privacy right is not absolute, and is therefore subject to the state's interests in the health and welfare of its citizens, "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' * * * and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.

4. After the three-judge district court denied Freiman's motion for summary judgment, Freiman amended his complaint by deleting the request for injunctive relief. The district court then granted Ashcroft's motion for summary judgment holding section 188.045 constitutional.

The legitimate state interest at stake here is protecting the mother by requiring an informed consent to the abortion decision. The Court in *Danforth* held that Mo. Ann. Stat. § 188.020(2) (Vernon 1978),[5] Missouri's informed consent provision, was not "in itself an unconstitutional requirement. The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 67. But the Supreme Court did not hold that a state may require physicians to provide to each patient any and all information required by the state, regardless of its legality, truth, constitutionality or medical advisability.[6] "[W]e are content to accept, as the meaning [of informed consent], the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession." *Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 67 n.8. Section 188.045 is not sufficiently "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade, supra,* 410 U.S. at 155.

5. Section 188.020(2) provides in part:

> No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> * * *
>
> (2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion[.]

6. Appellees admitted in oral argument that there has never been a live birth during the first 12 weeks of gestation and that under the present state of medical science it is impossible.

The information that section 188.045 requires the physician to relate to his patient prior to an abortion operation would most certainly put the physician in a straitjacket. It first requires the physician to warn his patient of consequences that should not occur, as the Missouri Act was written to prevent just such an event. The statutes provide that no abortion may be performed—unless it is to preserve the life or the health of the mother—without the physician first certifying that the fetus is not viable.[7] Section 188.040's provision for termination of parental rights only occurs if a live born infant results from an attempted abortion which was not performed to save the life or health of the mother. Thus, the warning, that if a live born infant results parental rights will be terminated, is for all practical purposes meaningless. By definition, this should not result.

Secondly, although requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, *Planned Parenthood* v. *Danforth, supra,* 428 U.S. at 66-67, the requirement that the physician tell his patient of section 188.040 is not reasonably related to the purpose of informed consent. Initially, section 188.045 makes no distinction between trimesters and thus is overbroad. Then the statute which section 188.045 requires the physician to relate to his patient is patently a denial of procedural due process,[8] and further, there is no record of an unsuccessful abortion performed during the first 12 weeks of gestation resulting in a live born infant. The result of a physician's warning would be to inject into the decision-making process be-

7. Mo. Ann. Stat. § 188.030 (Vernon 1978).

8. *See Wynn* v. *Scott,* 449 F. Supp. 1302, 1322-24 (N.D. Ill. 1978).

tween physician and patient a factor which is irrelevant and extraneous to the medical services being rendered. Section 188.045's imposition upon the physician to inform his patient of section 188.040 is a violation of the equal protection clause of the Fourteenth Amendment inasmuch as it singles out the abortion operation for the imposition of this "straitjacket" requirement. It is a violation of the due process clause because of the invasion into the delicate and private physician-patient relationship. Requiring the physician to relate section 188.040 interferes with the woman's right to consult with her physician concerning her decision of abortion without undue restriction by the state. *See Wynn* v. *Scott, supra,* 449 F. Supp. at 1316-17. Thus this court finds section 188.045 to be unconstitutional.

Affirmed in part; reversed in part.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

ORDER

(Filed November 28, 1977)

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that plaintiffs lack standing to challenge §188.040, R.S.Mo. (1974).

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment be and is denied.

/s/ William H. Webster
William H. Webster
United States Circuit Judge

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

/s/ John F. Nangle
John F. Nangle
United States District Judge

Dated: November 28, 1977.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

MEMORANDUM

(Filed November 28, 1977)

This matter is before the Court upon plaintiffs' motion for summary judgment. Plaintiffs, who are physicians, filed this suit seeking declaratory and injunctive relief against the enforcement of §§188.040 and 188.045, R.S.Mo. (1974). Jurisdiction is based upon the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. §§1331 and 1343. A three-judge Court was empaneled on July 9, 1976.

Section 188.040 provides:

> In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant

to section 211.411 [sic] RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.[1]

Section 188.045 provides:

Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 by the attending physician and the woman shall certify in writing that she has been so informed.

Plaintiffs allege that they are physicians who perform abortions within the first twelve weeks of gestation; that the possibility of a live birth resulting from an abortion performed within the first twelve weeks is totally nonexistent; that the legislation under attack herein, inhibits, chills, restrains, deters and precludes plaintiffs' patients from the full exercise of their constitutional rights; that the privacy of the physician-patient relationship is curtailed and chilled by this legislation, and that plaintiff-physicians are inhibited and precluded from the practice of medicine in their finest manner by the existence and application of this legislation.

In opposition to plaintiffs' motion for summary judgment, defendants have raised the question of standing. In *Singleton* v. *Wulff*, 44 U.S.L.W. 5213 (1976) the Court noted that there were two standing issues presented in the context of a challenge to abortion-related legislation by physicians. The first issue is whether the physicians

> . . . allege "injury in fact," that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's art. III jurisdiction . . . . *Id.* at 5215.

1. The reference to section 211.411 should probably read "section 211.441".

The second issue is whether the physicians should be allowed to assert the rights of third parties. In *Singleton*, the challenge was to legislation prohibiting the application of Medicaid benefits to abortions. The Court held that the physicians satisfied the first requirement of standing, the necessary concrete interest, since they would benefit monetarily if the statute were struck down. The Court then proceeded to determine that the physicians could assert the rights of their patients.

In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the Court held that Baird had standing to challenge a Massachusetts law prohibiting the dispensing of contraceptive devices in certain contexts since Baird had been convicted of violating that law. In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), appellants were held to have standing as they, too, were convicted of violating a statute regulating contraceptives. In *Barrows* v. *Jackson*, 346 U.S. 249 (1953), a defendant was allowed to raise a constitutional challenge to a restrictive covenant where the defendant would suffer economic injury as a result of the suit. In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) a private school was allowed to assert the rights of parents and guardians where the school's standing was based on its property rights. In all these cases, the party asserting the constitutional challenge had standing in his own right; it was only after this standing was determined that the Court determined whether the rights of third parties could be asserted.

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), the Court did not determine the standing of the N.A.A.C.P. in advance of a consideration of its ability to assert the rights of its members. This case is distinguishable, however. The N.A.A.C.P. was an association whose members acted as a body, and thus the association and its members were identical. Additionally, the Court noted that in the con-

text that existed therein, the members would lose the constitutional right asserted "at the very moment of its assertion". *Id.* at 459. The same situation does not exist herein. Accordingly, the Court concludes that the physicians must establish their own standing to challenge the legislation herein in advance of a determination of their ability to assert the rights of third parties.

It is apparent that plaintiffs have standing to challenge §188.045. The requirements of that section subjects them to possible revocation of license and criminal sanctions. See §§188.065 and 188.075, R.S.Mo. (1974). The Court must conclude, however, that plaintiffs lack standing to challenge §188.040. As stated in *Planned Parenthood of Central Missouri* v. *Danforth*, 44 U.S.L.W. 5197, 5200 at footnote 2 (1976)

> The physician-appellants do not contend that this section [188.040] of the Act imposes any obligation on them or that its operation otherwise injures them in fact. They do not claim any interest in the question of who receives custody that is "sufficiently concrete" to satisfy the "case or controversy" requirement of a federal court's Art. III jurisdiction.

Simply because plaintiffs have standing to challenge §188.045 does not mean that they can assert the rights of third parties, their patients, in order to challenge §188.040. Before the Court determines whether a plaintiff may assert the rights of third parties, the plaintiff's standing to challenge the legislation must be established. Plaintiffs have not established their standing to challenge §188.040. *Planned Parenthood, supra.*

With only §188.045 remaining, it is clear that plaintiffs' motion for summary judgment must be denied. In *Planned Parenthood, supra,* the Court held that a state may permissibly require a woman's prior written consent,

noting that "it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences". *Id.* at 5201. *Cf., Whalen* v. *Roe,* 45 U.S.L.W. 4166 (1977) (holding that stringent prescription recording requirements do not violate any constitutional rights of physicians).

Accordingly, plaintiffs' motion will be denied.

/s/ H. Kenneth Wangelin
H. Kenneth Wangelin
United States District Judge

/s/ John F. Nangle
John F. Nangle
United States District Judge

WEBSTER, Circuit Judge, concurring.

I reluctantly concur.

Section 7 (R.S. Mo. 1974 §188.040) is perhaps the most offensive of the *in terrorem* clauses that were enacted by the Missouri legislature in 1974, H.C.S. House Bill No. 1211, because it reflects a legislative conclusion that a woman who asserts her constitutional right to an abortion has thereby become unfit for parenthood if the child is somehow born alive. *See Planned Parenthood of Central Missouri* v. *Danforth,* 392 F. Supp. 1362, 1377 (E.D. Mo. 1975) (Webster, J., dissenting). This patently unconstitutional appendage, totally lacking in due process, survives like the last leaf in winter after *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976). It is regrettable that a Jane Doe does not come forward so that this question may be squarely addressed. Plaintiffs say this is unlikely because it is difficult to protect a pregnant woman's anonymity. At this stage, at least, that is an in-

sufficient answer to the presently insurmountable requirement of standing.

/s/ William H. Webster
William H. Webster
United States Circuit Judge

Dated: November 28, 1977.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

ORDER

(Filed February 17, 1978)

Pursuant to the memorandum filed this date,

IT IS HEREBY ORDERED that defendants' motion for summary judgment be and is granted and that this cause be and is dismissed.

/s/ John F. Nangle
United States District Judge

Dated: February 17, 1978.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 76-616C(3)

MICHAEL FREIMAN, M.D., et al.,
Plaintiffs,

vs.

JOHN D. ASHCROFT, et al.,
Defendants.

MEMORANDUM

(Filed February 17, 1978)

This matter is before the Court upon defendants' motion for summary judgment. Plaintiff physicians filed this suit seeking declaratory and injunctive relief against the enforcement of §§188.040 and 188.045, R.S.Mo. (1974). By order of this Court dated November 28, 1977, it was held that plaintiffs lack standing to challenge §188.040. Plaintiffs were granted leave on February 15, 1978 to amend their complaint by deleting the request for injunctive relief. Under these circumstances, a three-judge court is no longer necessary. *Seergy* v. *Kings County Republic County Committee*, 459 F.2d 308 (2d Cir. 1972). In response to the instant motion, plaintiffs have raised no facts which are disputed so as to preclude entry of summary judgment. Rule 56, Federal Rules of Civil Procedure.

Section 188.045, R.S.Mo. (1974) provides:

> Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 188.040 [terminating parental rights in cases

> where a live birth results from an attempted abortion not performed to save the life or health of the mother] by the attending physician and the woman shall certify in writing that she has been so informed.

Plaintiffs allege that this legislation inhibits, chills, restrains, deters and precludes plaintiffs' patients from the full exercise of their constitutional rights; that the privacy of the physician-patient relationship is curtailed and chilled; and that plaintiffs are inhibited and precluded from the practice of medicine in their finest manner by the existence and application of the statute.

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court held that a state may permissibly require written consent, as "it is desirable and imperative that it [the decision to abort] be made with full knowledge of its nature and consequences". *Id.* at 67. Certainly, the termination of parental rights, should a live birth result, is a consequence of the decision to abort. Absent a party with standing to challenge §188.040, termination of parental rights does remain a consequence of the decision to abort and the state may permissibly require a physician to so inform the patient. When viewed in this context the statute is clearly permissible. *Cf.*, *Whalen* v. *Roe*, 429 U.S. 589 (1977). Accordingly, the Court concludes that defendants' motion should be granted.

/s/ John F. Nangle
United States District Judge

Dated: February 17, 1978.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1144

Michael Freiman, M.D., and Allen S. Palmer, D.O.,
Appellants,

v.

John D. Ashcroft, Attorney General of the State of Missouri, and J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Filed: October 10, 1978

Before STEPHENSON, Circuit Judge, INGRAHAM,* Senior Circuit Judge, and HENLEY, Circuit Judge.

ORDER ON APPELLANTS' PETITION FOR REHEARING

Appellants in their petition for rehearing seek an award of attorney fees incurred on appeal. Appellants also pray that this court remand this cause to the district court for an award of reasonable attorney fees at the trial level. Upon invitation of the court, appellees filed a reply praying that this court deny appellants' petition for rehearing.

*The Honorable Joe M. Ingraham, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

After considering the matter, it is ordered that appellants are awarded the sum of $500.00 attorney fees incurred in this appeal. This cause is further remanded to the district court for an award of reasonable attorney fees at the trial level. All attorney fees are to be awarded against defendants-appellees in their official capacities only.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 78-1144

MICHAEL FREIMAN, M.D., and,
ALLEN S. PALMER, D.O.
Plaintiffs-Appellants,

v.

JOHN D. ASHCROFT, Attorney General, State of Missouri, and, J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Defendants-Appellees.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

(Filed December 14, 1978)

Notice is hereby given that John D. Ashcroft, Attorney General of the State of Missouri, and one of the named defendants-appellees in the above-referenced legal proceeding, hereby appeals to the Supreme Court of the United States, from that portion of the final order and opinion, filed by this Court on September 13, 1978, which reverses the decision of the United States District Court for the Eastern District of Missouri, in part, by holding unconstitutional Section 188.045, RSMo Supp. 1975.

This Court entered its order disposing of the appellants' Petition for Rehearing on October 10, 1978, which Petition for Rehearing tolled the running of the 90-day period in which to file a notice of appeal to the United States Supreme Court. *Department of Banking* v. *Pink*,

317 U.S. 264, 266, 63 S.Ct. 233, 87 L.Ed. 254 (1942); *Forman* v. *United States*, 361 U.S. 416, 426, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960); *Pfister* v. *Northern Illinois Finance Corporation*, 317 U.S. 144, 149-150, 63 S.Ct. 133, 87 L.Ed. 146 (1942).

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Respectfully submitted,

John Ashcroft
Attorney General

/s/ Michael L. Boicourt
Michael L. Boicourt
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John D. Ashcroft, Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed postage prepaid this 12th day of December, 1978, to:

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All parties required to be served have been served.

/s/ Michael L. Boicourt
Michael L. Boicourt